IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9185 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE AKIL KURESHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KS MEHROTRA C/O PUNIT TRIPATHI

Versus

OIL AND NATURAL GAS CORPN LTD

Appearance:

1. Special Civil Application No. 9185 of 1998

MR JITENDRA M PATEL for Petitioner No. 1

MR RH MEHTA for Respondent No. 1

DELETED for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE AKIL KURESHI

Date of decision: 21/09/2004

ORAL JUDGEMENT

In the present petition, the petitioner has challenged the order dated 13th April 1986, passed by the

respondents by which the petitioner was ordered to be compulsorily retired having attained the age of 50 years.

2. Short factual background leading to the present petition can be noted at the outset. The petitioner had joined the services of the respondent No.1, Oil and Natural Gas Corporation (hereinafter to be referred as "the Corporation") as an Executive Engineer (Electrical) in January 1963. The petitioner was thereafter promoted from time to time as Senior Engineer, thereafter as Joint Director and lastly as Chief Engineer. The last promotion to the post of Chief Engineer was given to the petitioner in January 1982.

3. The petitioner having crossed the age of 50 years, the respondent in exercise of powers under the ONGC (Terms and Conditions of Appointment and Service) Regulations, 1975 ("the said Regulations" for short) considered his case for further retention in service. It is not in dispute that under regulation 25(4) of the said Regulations, the appointing authority, if it is of the opinion that it is in the Commission's interest so to do, has the right to retire any employee after he has attained the age of 50 years by giving him notice of not less than three months in writing or by giving three months pay and allowances in lieu of such notice.

4. In exercise of the powers under sub-rule (4) of regulation 25 of the said Regulations, the respondent by the impugned order dated 13th April 1986 ordered that the petitioner shall be retired immediately and the pay and allowance for a period of three months were simultaneously ordered to be paid to him. Being aggrieved by the said order dated 13th April 1986, the petitioner approached this Court by filing Special Civil Application No.1833/87, which came to be disposed by the learned single Judge of this High Court by a decision dated 8.10.97 wherein the Court directed the respondent to constitute a fresh Screening Committee of three officers other than those officers who were members of the earlier Screening Committee who had advised that the petitioner should be retired prematurely. It was directed that the case of the petitioner should be considered afresh on the basis of the material which was there before the earlier Committee. It was further directed that in case the Screening Committee finds that the petitioner deserves to be continued in service, he shall be entitled to all consequential benefits.

5. Pursuant to the above directions of this Court, the respondent constituted a fresh Committee to consider

the case of the petitioner for being retained in service. However, the newly constituted Committee also concluded that the petitioner's services were not required to be continued and accordingly, a fresh order came to be passed on 22nd April 1998. This order of 22nd April 1998 was also communicated to the petitioner on 1st May 1998. Along with the said order, by Ex.A, the respondent recorded the reasons for the conclusion of the Committee. The observations of the Committee as found in the order are as under:

"i) That the committee on perusal of PAR reports is of the opinion that there had been a declining trend in the performance of Shri K.S.Mehrotra.

ii) That he had reached the stage of inefficiency and incompetence and chance or prospect for improvement of his performance was negligible is seen from the fact that even during his stint in GAIL, he was not able to work and was reverted to ONGC.

"He has worked about 4 months on HBJ Project. Out of which one month was spent at Baroda. 1-1/2 months on sick leave and for the rest one month, winding up to return to ONGC (Annexure-A)."

iii) The comment of board level officer, Member (Onshore), Shri H.G.T.Woodword as early as 2.4.83 is

"This officer would prefer that we retire him under the Commission's early retirement scheme."

"In his frame of mind, I consider there is no area, where improvement is possible." (Annexure-B).

iv) That during his tenure in ONGC from 1963 to 1986, the individual was transferred to Ahmedabad but had requested for posting to Baroda which was agreed to by the competent authority. It is thus evident that the officer had restricted his movement on transfer due to family problems or ill health. Even the PAR of 1982 contains the following remarks:

"He had a heart attack during the year and seems to be somewhat obsessed now that his

health is not good as a consequence his effectiveness has been far less than what are expected of a Chief Engineer." (Annexure-C).

v) That the individual had avoided transfer and requested for deferment of transfer despite the fact that it was in the interest of Commission's work, indicates that the individual had not shown any interest in the organisation (Annexure-D).

That, therefore, the Committee, which met on 09.03.98 at KDMIPE, Dehrudun, after examining the details above based on the performance Appraisal reports and service records of Shri K.S.Mehrotra, is of the opinion that the organisation was justified in retiring him from the services of ONGC on 13.4.86 under the provisions of Regulation 25(4) of ONGC (Terms and Conditions of Appointment and Service) Regulations, 1975."

6. Aggrieved by the said decision of the respondent, the petitioner has filed this petition challenging the order dated 22nd April 1998.

7. Appearing for the petitioner, learned counsel Shri J.M.Patel has submitted that the action of the respondent is illegal and unlawful and that there is no material on record to come to the conclusion that the petitioner was not required to be retained in service beyond the age of 50 years. He has further submitted that the Committee has recorded reasons which are not germane and not borne out from the available material on record. He has submitted that the Committee did not consider the case of the petitioner in proper perspective and looking to the service record of the petitioner, it was not possible for the Committee to come to the conclusion that his services are not required to be continued.

8. Though in the petition, the petitioner has challenged the validity of regulation 25(4) of the said Regulations, no submissions are made in this regard and the challenge is therefore not considered.

9. Learned advocate for the petitioner has by referring to the material on record submitted that the reasons communicated by the Committee are not borne out from any material on record. He has pointed out that a detailed affidavit has been filed by the petitioner

wherein each ground enumerated by the Committee has been commented upon and on the basis of the said affidavit, learned counsel has sought to point out that the grounds which have been taken into consideration by the Committee were not sufficient to order premature retirement of the petitioner and that the performance of the petitioner was such that the decision to retire him prematurely was not warranted. The learned counsel has also read the earlier order passed by this Court in Special Civil Application No.1833 of 1987 and submitted that the service record of the petitioner was satisfactory and that the Committee erred in coming to the conclusion that the services of the petitioner are no longer required to be retained. The learned counsel has further submitted that no adverse remarks were communicated to the petitioner. In absence of the adverse remarks and in absence of any other adverse material, the decision of the Committee is perverse.

10. In support of the above contentions, learned advocate for the petitioner has relied on several decisions of this Court as well as of the Hon'ble Supreme Court of India.

11. The decision in the case of State of Gujarat v. Umedbhai M. Patel, (2001) 3 SCC 314, has been relied upon by the learned advocate for the petitioner wherein the Hon'ble Supreme Court has summarised the law relating to compulsory retirement. In the said decision, the Hon'ble Supreme Court was pleased to observe that there were no adverse entries in the employees confidential record and he was placed under suspension on 22.5.86 pending disciplinary proceedings and the authorities without waiting for the conclusion of the inquiry, decided to dispense with the service of the employee merely on the basis of the allegations which had not been proved and in that view of the matter, the Hon'ble Supreme Court was pleased to confirm the decision of the Division Bench of the High Court by which the order of compulsory retirement of the Government was set aside. In the present case, however, it is not the case of the petitioner that the order of compulsory retirement was passed to by-pass the departmental proceedings.

12. Reliance is also placed on the decision in the case of Shankerbhai G. Chaudhary v. State of Gujarat, 1998(1) GLR 668. In the said decision, however, one finds that the Court was concerned with the question of promotion of an employee upon expunction of the adverse remarks. The ratio laid down therein would, therefore, not apply in the facts of the present case.

13. The decision in the case of D.G.Desouza v. Director General of Police, 1991(1) G.L.H. (U.J.) 10 has been cited by the learned advocate for the petitioner in which it is observed that adverse remarks not communicated to the employee or against which representation is pending, cannot be considered for passing an order of compulsory retirement. The learned advocate for the petitioner has also relied on a decision in the case of Kantilal G. Shah v. State, 1984(2) GLR 809 wherein the learned single Judge of this Court was pleased to strike down the order of compulsory retirement passed by the Government on the ground that adverse remarks if not communicated within reasonable time cannot form a basis for compulsory retirement. This view, however, has not been approved by the Hon'ble Supreme Court in later decisions beginning with the case of Baikuntha Nath Das v. Chief Dist. Medical Officer, Baripada, AIR 1992 SC 1020 and several other decisions. However, I do not dilate on this question since in the present case, the question of adverse remarks having been utilised for passing the order of compulsory retirement does not arise.

14. Learned advocate for the petitioner has also placed reliance on the decision of the learned single Judge dated 17th March 2004 passed in Special Civil Application No.7973 of 1989. In the said decision, the High Court was pleased to set aside order of compulsory retirement. In the said decision, one finds that the Court was concerned with a case where the order of compulsory retirement was passed on the ground of doubtful integrity and the High Court found that there was no material before the Court to substantiate the said allegations.

15. Learned advocate for the petitioner placing reliance on the decision reported in 1991(1) GLR 619 (J.M.Mehta v. State of Gujarat) has contended that the Court has the power to lift the veil and if found that the order of compulsory retirement is a camouflage, the order should be set aside.

16. Appearing for the respondent, learned counsel Shri R.H.Mehta has contended that the impugned decision of the respondents is proper and legal. He submits that the Committee has taken into consideration all relevant aspects of the matter and has come to the conclusion which cannot be faulted. He submits that the scope of judicial review of the decision of the employer to compulsorily retire an employee in exercise of powers

under the Service Rules is narrow. He submits that in view of the decision of the Hon'ble Supreme Court, this Court cannot go into the question of sufficiency of the material which prompted the Committee to come to the conclusion that the petitioner's services are not required to be retained.

17. Learned advocate for the respondent pointing out from the affidavit in reply field by the respondent contended that it is doubtful whether the petitioner is a citizen of India or not and therefore the petition would not be maintainable. In view of the fact that since the petitioner has based his petition also under Article 14 of the Constitution of India, which is available to non-citizens also, the counsel has not seriously pressed this point. He has, however, strongly contended that it is not open to this Court to examine the material to come to a different finding unless any perversity is pointed out.

18. Before dealing with the rival contentions, a few decisions of the Hon'ble Supreme Court on the question of powers of the Court while dealing with the question of compulsory retirement can be noted.

19. In the case of Baikuntha Nath Das v. Chief Dist. Medical Officer, Baripada reported in AIR 1992 SC 1020, the Hon'ble Supreme Court observed that the order of compulsory retirement is not a punishment and attaches no stigma nor suggestion of any misbehaviour. It was further observed that while passing the order of compulsory retirement, employer can also take into consideration uncommunicated adverse remarks. It was held that since the order of compulsory retirement is not punitive, principles of natural justice do not apply to such orders. It was further observed that the High Court would not examine the matter as an appellate court and interference would be permissible only if the Court is satisfied that the order is passed mala fide or it is based on no evidence or that it is arbitrary in the sense that no reasonable person would form the requisite opinion on the given material and in other words, if it is found to be perverse order. In para 32 of the said decision, the following ratio has been laid down:

"32. The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary - in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter - of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference. Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 29 to 31 above."

20. In the decision in the case of Posts & Telegraph Board v. C.S.N.Murthy reported in AIR 1992 SC 1368, the Hon'ble Supreme Court once again reiterated that the question of retiring a Government servant compulsorily is to be decided by the Government in exercise of powers bona fide and material on record and the Court should not ordinarily interfere with such decisions if it is arrived

at bona fide and on the basis of material available on record.

21. In the decision in Union of India v. V.P.Seth, AIR 1994 SC 1261, the Hon'ble Supreme Court once again reiterated the principles to be borne in mind while examining the legality of the order of compulsory retirement and relying on the decisions of Baikuntha Nath Das (supra) and Post and Telegraph Board (supra), it was once again reiterated that uncommunicated adverse remarks can be considered for passing the order of compulsory retirement and judicial review of such an order can be made only on the ground of malafides, arbitrariness or perversity. It was also observed that since the order of compulsory retirement is not a penal order, principles of natural justice and rule of audi alteram partem would not apply.

22. In a decision reported in (1995) 3 SCC 608 (Chief G.M., State Bank of India v. Suresh Chandra Behra) it was observed that the High Court cannot examine the order of compulsory retirement as an appellate authority.

23. Keeping these judicial principles in mind and reverting back to the present case, it can be seen that the Committee constituted as per the directions of this Court had reconsidered the question of retention of the petitioner in service beyond the age of 50 years and upon conclusion of the exercise, the Committee has recorded reasons to come to the conclusion that the petitioner is not required to be retained in service and that the Corporation was justified in retiring him with effect from 13th April 1986. Several observations have been made by the Committee, details of which need not be discussed at length. Suffice it to say that the Committee found on the basis of the service record of the petitioner and remarks made therein that the earlier decision was correct. The learned advocate for the petitioner has tried to dislodge the reasoning of the Committee by pointing out that the there is no material on record to come to such a conclusion. I have, for the sake of satisfying myself, looked into the service record of the petitioner, as borne out from the minutes of the earlier Committee, which was made available to the Court by the learned advocate for the respondent, which is being ordered to be taken on record. In the service record of the petitioner, it has been observed that for the year 1976-77, the officer's performance was on the dropping curve and no purpose would be served in even communicating below normal markings unless he is put on a field job. For the year 1977-78, it was observed that he

had shown very little initiative in going out of his way to involve HODI despite its reduced strength in more productive designing work in the field. For the service record of 1981-82, it was recorded that the petitioner had a heart attack and he was obsessed that his health is not good and that has reduced his effectiveness. For the year 1982-83, the remark was that the officer would prefer to retire under the early retirement scheme and in the frame of mind, there is no area where improvement is possible. For the year 1983-84, it was recorded that the petitioner had not been able to contribute much. For the year 1984-85, it was stated that the petitioner has been in poor health throughout his stay in GAIL and had availed a total of 150 days leave.

24. From the above remarks in the service record of the petitioner coupled with the fact that for the years 1982-83, 1983-84 and 1984-85, the petitioner had received rating of 4, 5 and 3-4 respectively (which according to the learned advocates appearing for both the sides, indicate below average ranking), it is not possible to come to the conclusion that there was no material before the Committee to arrive at a finding that the services of the petitioner were not required to be retained beyond the age of 50 years. It is true that the petitioners was promoted in the year 1982 and that therefore his performance of the year 1977-78 and 1976-77, which was not found entirely satisfactory to his superior officer would lose its significance to some extent. This by itself, however, cannot be a circumstance to conclude that the findings of the committee are perverse and that there was no material before the Committee to conclude that the petitioner is a dead-wood required to be retired in the interest of the organization. As noted earlier, the Hon'ble Supreme Court has held that the order of compulsory retirement cannot be set aside by the Court unless the same is passed either malafide, arbitrarily or is wholly perverse. In the present case, no allegations of malafides have been made out. Since I also find that there was some material on record to arrive at a conclusion that it did, it is not possible for this Court to overrule the findings of the Committee. As noted earlier, this Court is not examining the findings of the Committee as an appellate court and cannot set aside the same even if another view is possible. Since it is entirely upon the employer to assess the service performance of the petitioner to decide his retention beyond the age of 50 years and since I find that the respondent through the newly constituted Committee as directed by this Court had taken into account all relevant factors before coming to the conclusion that the

earlier decision was correct, it is not possible for this Court to interfere with the decision of the respondents.

25. In the result, I find that the petition is required to be rejected and the same is hereby rejected. Rule is discharged with no order as to costs.

(Akil Kureshi, J.)
(vjn)